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# Social Host Liability to Third Parties for the Acts of Intoxicated Adult Guests: Kelly v. Gwinnell

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# NOTE

# SOCIAL HOST LIABILITY TO THIRD PARTIES FOR THE ACTS OF INTOXICATED ADULT GUESTS: *KELLY V. GWINNELL*

DONALD Gwinnell consumed several drinks while at the home of the Joseph Zaks. Gwinnell left the Zaks' home shortly before 9:00 p.m. and was involved in a head-on collision while driving home.[1] The collision seriously injured the driver of the other car, Marie E. Kelly. Kelly sued Gwinnell and, under a respondeat superior theory, Gwinnell's employer.[2] Gwinnell and his employer sued the Zaks in a third-party action. Kelly later amended her complaint to name the Zaks as primary defendants. The Zaks obtained a summary judgment on the grounds that, as a matter of law, a social host is not liable to third parties for the negligent acts of an adult guest who has become intoxicated at the host's home. The New Jersey Appellate Division affirmed, holding that a social host who has furnished alcoholic beverages to an adult is not liable for damages resulting from the guest's intoxication.[3] The New Jersey Supreme Court granted a petition for certification. *Held, reversed*: When a social host provides the means of intoxication to an adult guest, the host may be liable for any damages to third parties resulting from the guest's subsequent drunken driving. *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984).

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1. According to Gwinnell and the Zaks, Gwinnell consumed two or three drinks during his stay. A later blood test indicated that Gwinnell's blood alcohol concentration was 0.286%. Under present New Jersey law, a person who drives with a blood alcohol percentage of 0.10 or more is guilty of driving under the influence of intoxicating liquor. N.J. STAT. ANN. § 39:4-50 (West Supp. 1984-1985). According to expert testimony, Gwinnell's blood alcohol level indicated that he had not consumed two or three drinks, but, rather, the equivalent of 13 drinks, and that Gwinnell would have shown obvious signs of intoxication.

2. Gwinnell was employed by Paragon Corporation, the owner of the vehicle that Gwinnell was driving. Under the doctrine of respondeat superior an employer can be liable for the acts of his employee. 53 AM. JUR. 2D *Master and Servant* § 417 (1970).

3. The appellate division noted that no other jurisdiction in the United States had adopted the precise cause of action that Kelly had asserted. Kelly v. Gwinnell, 190 N.J. Super. 320, 463 A.2d 387, 390-91 (Super. Ct. App. Div. 1983); *see* Annot., 97 A.L.R.3d 528, 536-40 (1980). A New Jersey trial court, however, had in 1982 recognized social host liability to a third person for the acts of an intoxicated adult guest. Figuly v. Knoll, 185 N.J. Super. 477, 449 A.2d 564, 565 (Super. Ct. Law Div. 1982). Furthermore, the appellate division in *Gwinnell* stated that the social host could be liable when the guest was a minor. 463 A.2d at 388; *accord* Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15, 17-18 (Super. Ct. App. Div. 1976).

## I. THE HISTORY OF SOCIAL HOST LIABILITY

The common law recognized no cause of action against a commercial or social host for injuries to third persons caused by the host's intoxicated patrons or guests.[4] The rationale behind the common law rule was that the voluntary consumption of alcohol, rather than the mere furnishing of alcohol, was the proximate cause of any subsequent injury.[5] A state legislature's enactment of a dram shop act created an exception to the common law rule.[6]

Dram shop acts impose strict civil liability on furnishers of alcohol for injuries or damages caused by intoxicated persons served with alcohol in dram shops.[7] Dram shop acts usually have been narrowly construed in the jurisdictions that adopted them.[8] As a result, the acts have been applied only against commercial suppliers of intoxicating beverages.[9] Courts in two jurisdictions, Minnesota and Iowa, have attempted to extend dram shop lia-

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4. Halligan v. Pupo, 37 Wash. App. 84, 678 P.2d 1295, 1297 (1984). The *Halligan* court cited Halvorsen v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897, 899 (1969), in which 30 AM. JUR. *Intoxicating Liquors* §§ 520-521 (1958) was quoted with approval: "[I]t is not a tort to either sell or give intoxicating liquor to ordinary able-bodied men, and . . . in the absence of statute, there can be no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person so furnished . . . ." *Accord* Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450, 457 (1955); Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d 708, 712-13 (1949); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847, 851 (1966); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682, 687 (1958); *see also* Comment, *Civil Liability for Furnishing Liquor in California*, 5 PAC. L.J. 186, 187 (1974) (discussing common law rule).

5. See Vesely v. Sager, 5 Cal. 3d 153, 158-59, 486 P.2d 151, 155, 95 Cal. Rptr. 623, 627 (1971), for a compilation of case citations and the explanation of the rationale supporting the common law rule; *see also* Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450, 457 (1955) (supporting the common law rule). *See generally* Annot., 75 A.L.R.2D 833, 835 (1961); Annot., 130 A.L.R. 352, 357 (1941); 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969) (all stating and explaining the background of the common law rule).

6. Halligan v. Pupo, 37 Wash. App. 84, 678 P.2d 1295, 1297 (1984) (quoting 30 AM. JUR. *Intoxicating Liquors* §§ 520-521 (1958)):

> It is generally held that there can be no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person so furnished even though the liquor was sold or given to one in violation of a law other than under a [dram shop] act . . . .

7. Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L. REV. 561, 563-64 (1980). A dram shop is a "place where spiritous liquors are sold by the dram or drink; a barroom." WEBSTER'S INTERNATIONAL DICTIONARY 782 (2d ed. 1951). Dram shop acts are often called civil damage acts. *See, e.g.*, CONN. GEN. STAT. § 30-102 (1977); OR. REV. STAT. § 30.730 (1977); R.I. GEN. LAWS § 3-11-2 (1976).

8. Only 16 states currently have dram shop acts: ALA. CODE § 6-5-71 (1975); CONN. GEN. STAT. ANN. § 20-102 (West 1975); DEL. CODE ANN. tit. 4, § 713 (1975); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1981); IOWA CODE ANN. § 123.92 (West Supp. 1984-1985); ME. REV. STAT. ANN. tit. 17, § 2002 (West 1965); MICH. COMP. LAWS ANN. § 436.22 (West 1978); MINN. STAT. ANN. § 340.95 (West Supp. 1984); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978); N.D. CENT. CODE § 5-01-06 (1983); OHIO REV. CODE ANN. § 4399.01 (Page 1982); OR. REV. STAT. § 30.730 (1977); R.I. GEN. LAWS § 3-11-2 (1976); VT. STAT. ANN. tit. 7, § 501 (1972); WIS. STAT. ANN. § 176.35 (West Supp. 1979-1980); WYO. STAT. § 12-5-502 (Supp. 1977).

9. Graham, *supra* note 7, at 564-66; Note, *Extension of the Dram Shop Act: New Found Liability of the Social Host*, 49 N.D.L. REV. 67, 72-74 (1972); *see, e.g.*, Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046, 1048 (1981); Behnke v. Pierson, 21 Mich. App. 219, 175 N.W.2d 303, 303-04 (1970); Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548, 551-52 (Sup. Ct. 1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976).

bility to social hosts.[10] The legislatures of those jurisdictions reacted to this extension, however, by amending the statutes, making them applicable only to commercial sellers.[11] The remaining jurisdictions that have enacted dram shop acts disallow social host liability under the statutes.[12] Although New Jersey had a dram shop act during prohibition, the act was repealed when prohibition ended in 1934.[13] At the time of Gwinnell's accident, therefore, a dram shop act was not in force.

Prior to 1959 no court had directly attacked the common law rule of nonliability or attempted to establish an area of common law dram shop liability.[14] Many courts, however, had begun to reevaluate the common law rule of nonliability in light of the developing premise that the serving of liquor initiated a foreseeable chain of events for which commercial suppliers of alcohol might be held liable.[15] These courts looked beyond the common law rule that the consumption of alcohol was the proximate cause of any subsequent injury resulting from intoxication and instead focused on the provider's foreseeability of injury to or by the consumer of alcohol.[16]

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10. Williams v. Klemesrud, 197 N.W.2d 614, 615-16 (Iowa 1972); Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149, 152-53 (1972); *see also* Graham, *supra* note 7, at 566-67 (emphasizing decisions departing from traditional interpretations of dram shop acts); Note, *California Finds Social Host Can Be Liable to Third Parties for Intoxicated Guests' Negligent Acts*—Coulter v. Superior Court, 12 CREIGHTON L. REV. 945, 954 (1979) (dram shop acts form basis for liability). The Minnesota Supreme Court applied MINN. STAT. ANN. § 340.95 (West 1972) to a social host and stated that the purpose of this dram shop act was to impose liability on "every violator whether in the liquor business or not." Ross v. Ross, 200 N.W.2d at 152-53. The Iowa court has applied IOWA CODE ANN. § 129.2 (West 1949) to a social host by interpreting the act's scope of liability against "any person" who sells or gives liquor under the dram shop act as including the social host. Williams v. Klemesrud, 197 N.W.2d at 615-16.

11. In Minnesota the dram shop act was amended by removing the word "giving," making the statute clearly applicable only to sellers of alcoholic beverages and not to social hosts. Graham, *supra* note 7, at 568; *see* MINN. STAT. ANN. § 340.95 (West Supp. 1980). The Iowa legislature repealed the portion of the statute referring to "any person," which the court in Williams v. Klemesrud, 197 N.W.2d 614, 615-16 (Iowa 1972), had interpreted as extending the act to the social host. Graham, *supra* note 7, at 568; *see* IOWA CODE ANN. § 123.92 (West Supp. 1984-1985).

12. *See, e.g.*, DeLoach v. Mayer Elec. Co., 378 So. 2d 733, 734 (Ala. 1979) (dram shop act has no application absent sale of alcohol); Heldt v. Brei, 118 Ill. App. 3d 798, 455 N.E.2d 842, 844 (1983) (dram shop act has no application since social host not in business of selling liquor); Behnke v. Pierson, 21 Mich. App. 219, 175 N.W.2d 303, 304 (1970) (dram shop act not applicable to social host).

13. Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1, 8 (1959). When New Jersey's dram shop act was repealed in 1934, it was replaced by the Alcoholic Beverage Control Act. *See* N.J. STAT. ANN. §§ 33:1-1 to :4-1 (West Supp. 1984-1985).

14. Holden, Coulter v. Superior Court of San Mateo County *and its Legislative Abrogation: The Common Law Liability of the Social Host*, 23 ST. LOUIS U.L.J. 612, 616-17 (1979).

15. Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358, 359 (1969) (court chose not to follow jurisdictions that had judicially abrogated common law rule); *see* Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147, 148-50 (1940) (commercial supplier of alcohol negligent in selling alcohol to known drunkard); Nally v. Blandford, 291 S.W.2d 832, 835 (Ky. Ct. App. 1956) (liquor licensee negligent in selling whiskey to customer who boasted he would drink entire quart of whiskey without stopping, did so, and died); Ibach v. Jackson, 148 Or. 92, 35 P.2d 672, 680 (1934) (noncommercial defendant negligent for inducing woman to drink alcohol to point of death); McCue v. Klein, 60 Tex. 168, 170-71 (1883) (tavern keeper negligent for allowing patron to drink until he died).

16. Ibach v. Jackson, 148 Or. 92, 35 P.2d 672, 677-78 (1934); McCue v. Klein, 60 Tex. 168, 170 (1883).

In 1959 the New Jersey Supreme Court became the first state court to abrogate expressly the common law rule of nonliability, reasoning in *Rappaport v. Nichols*[17] that personal injury was an eminently foreseeable consequence of serving an intoxicated customer more liquor. The court's decision in *Rappaport* became the landmark case on common law dram shop liability.[18] In *Rappaport* the sale of liquor to a minor caused his intoxication and subsequent death in an automobile accident. The minor's wife brought a wrongful death action against the tavern owner who sold the liquor to the decedent. The *Rappaport* court held that serving alcohol to an intoxicated minor constituted negligence.[19] Such an act created an unreasonable risk of harm to members of the traveling public, considering the foreseeability of resulting injury.[20] The court also held that the furnishing of liquor may be the proximate cause of injuries to third persons inflicted by an intoxicated customer.[21] In determining liability the court used a "substantial factor" test instead of a stricter proximate cause test.[22] Under the court's test the furnishing of alcohol may be a proximate cause of a subsequent accident if that act is a substantial factor in bringing about the accident.[23] The customer's alcohol consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes.[24] The *Rappaport* holding, however, was specifically limited to a tavern owner who unlawfully served alcoholic beverages to a minor.[25]

*Rappaport* marked the beginning of a trend to impose liability on commer-

17. 31 N.J. 188, 156 A.2d 1 (1959).

18. *Rappaport* was preceded by Waynick v. Chicago's Last Dep't Store, 269 F.2d 322, 326 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960), in which the court held that selling liquor to intoxicated men was the proximate cause of an automobile collision. Although *Waynick* preceded *Rappaport* by a few months, *Waynick* was a federal court case, and the court did not explain its reasoning. *Rappaport*, on the other hand, contained a more detailed decision and, therefore, became the major precedent in the area of common law dram shop liability. Holden, *supra* note 14, at 617.

19. 156 A.2d at 10.

20. *Id.* at 8; Holden, *supra* note 14, at 617-18.

21. 156 A.2d at 9; Holden, *supra* note 14, at 618. The proximate cause issue traditionally had been the major obstacle to finding a cause of action based on social host liability. *See supra* notes 4-5 and accompanying text.

22. 156 A.2d at 9-10; *see also* Holden, *supra* note 14, at 618-19 (discussing significance of *Rappaport*). An action is the proximate cause of a resulting occurrence if the result is reasonably foreseeable and the act is a substantial factor in causing the occurrence. W. PROSSER, LAW OF TORTS 248, 250 (4th ed. 1971).

23. 156 A.2d at 9-10. The New Jersey court relied on Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960), and several cases involving negligent entrustment, rather than cases involving alcoholic beverages. The court analogized the causation question posed in *Rappaport* to that in entrustment cases in which the negligent conduct of the defendants contributed to the injury of innocent third persons. 156 A.2d at 7 and cases cited therein.

24. 156 A.2d at 9-10.

25. *Id.* at 10. In deciding to hold liquor licensees civilly liable, the court relied heavily on the fact that the service of alcohol to a minor was in contravention of a statute and administrative regulation. *Id.* at 8, 10 (citing N.J. REV. STAT. § 33:1-77 (1939); Division of Alcoholic Beverage Control, Reg. No. 20, R. 1); *see also* Holden, *supra* note 14, at 619 (discussing duty in *Rappaport* as established by statute).

cial suppliers of alcohol.[26] A substantial number of jurisdictions have concluded that the sale of alcohol by a commercial supplier may be the proximate cause of injuries to third persons.[27] Many other jurisdictions, however, still maintain that an injured party has no cause of action against a commercial supplier of alcohol absent a dram shop act.[28] Most courts have given *Rappaport* a limited reading, requiring the existence of an alcoholic beverage control statute that imposes duties on licensees regarding whom they may serve as a prerequisite to applying a negligence analysis.[29]

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26. Holden, *supra* note 14, at 619 (noting significance of *Rappaport* as forerunner of subsequent cases imposing liability).

27. The following jurisdictions have asserted common law dram shop liability against commercial suppliers: Alaska (Nazareno v. Urie, 638 P.2d 671, 673 (Alaska 1981)); Arizona (Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200, 204-05 (1983) (en banc)); California (Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 158, 95 Cal. Rptr. 623, 626-27 (1971) (en banc) (abrogated by statute)); Colorado (Kerby v. Flamingo Club, Inc., 35 Colo. App. 127, 532 P.2d 975, 979 (1979)); Connecticut (Kowal v. Hoffer, 181 Conn. 355, 436 A.2d 1, 3-4 (1980)); Delaware (Taylor v. Ruiz, 394 A.2d 765, 768 (Del. Super. Ct. 1978)); District of Columbia (Marusa v. District of Columbia, 484 F.2d 828, 833 (D.C. Cir. 1973)); Florida (Prevatt v. McClennan, 201 So. 2d 780, 781 (Fla. Dist. Ct. App. 1967)); Hawaii (Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533, 537 (1980)); Idaho (Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135, 137 (1980)); Indiana (Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847, 849 (1966)); Iowa (Snyder v. Davenport, 323 N.W.2d 225, 225-26 (Iowa 1982)); Kentucky (Pike v. George, 434 S.W.2d 626, 629 (Ky. 1968)); Louisiana (Thrasher v. Leggett, 373 So. 2d 494, 497 (La. 1979); Pence v. Ketchum, 326 So. 2d 831, 835 (La. 1976)); Maryland (Felder v. Butler, 292 Md. 174, 438 A.2d 494, 499 (1981)); Massachusetts (Adamian v. Three Sons, Inc., 353 Mass. 493, 233 N.E.2d 18, 20 (1967)); Michigan (Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820, 824 (1973) (when civil damage act inapplicable)); Minnesota (Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618, 624 (1973) (when civil damage act inapplicable)); Mississippi (Munford, Inc. v. Peterson, 368 So. 2d 213, 217-18 (Miss. 1979)); Missouri (Carver v. Schafer, 647 S.W.2d 570, 574-75 (Mo. Ct. App. 1983)); Montana (Deeds v. United States, 306 F. Supp. 348, 361 (D. Mont. 1969)); New Hampshire (Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900, 901 (1965)); New Jersey (Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1, 8-9 (1959)); New York (Vale v. Yawarski, 79 Misc. 2d 320, 359 N.Y.S.2d 968, 970 (1974)); North Carolina (Hutchison v. Hawkins, 63 N.C. App. 1, 303 S.E.2d 584, 586 (1983)); Ohio (Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E.2d 884, 887 (1973)); Oregon (Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18, 21 (1971) (en banc)); Pennsylvania (Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550, 552 (1964)); Tennessee (Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755, 759 (1964)); Washington (Young v. Caravan Corp., 99 Wash. 2d 655, 663 P.2d 834, 837-38 (1983) (en banc)).

28. The following states disallow a cause of action absent application of a dram shop act: Arkansas (Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656, 657 (1965)); Delaware (Wright v. Moffitt, 437 A.2d 554, 557-59 (Del. 1981)); Florida (Barber v. Jensen, 428 So. 2d 770, 771 (Fla. Dist. Ct. App. 1983); Lone Star Florida, Inc. v. Cooper, 409 So. 2d 758, 759-60 (Fla. Dist. Ct. App. 1982)); Illinois (Gustafson v. Matthews, 109 Ill. App. 3d 884, 441 N.E.2d 388, 391 (1982)); Nebraska (Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65, 70 (1976)); Nevada (Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358, 360 (1969)); New Mexico (Hall v. Budagher, 76 N.M. 591, 417 P.2d 71, 73 (1966)); Wisconsin (Olsen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178, 180 (1979), *rev'd sub nom.* Sorensen *ex rel.* Kerscher v. Jarvis, 119 Wis. 2d 627, 359 N.W.2d 108 (1984)).

29. Holden, *supra* note 14, at 619-20. A dram shop act creates civil liability against the seller of alcohol for injuries resulting from a drinker's intoxication, but an alcoholic beverage control statute simply regulates the sale and distribution of alcohol to individuals who represent a high risk, such as minors or intoxicated persons, with no accompanying liability for injuries. Graham, *supra* note 7, at 569. All states and the District of Columbia have enacted alcoholic beverage control statutes. *See* Graham, *supra* note 7, at 569-70 n.42 (listing alcohol control provisions of all states and District of Columbia, as of 1980). Absent a duty no cause of action is available under a traditional negligence analysis. See *infra* note 62 for an explanation of the traditional negligence analysis and the significance of duty thereunder.

In *Soronen v. Olde Milford Inn, Inc.*[30] the New Jersey Supreme Court appeared to ratify a restricted reading of *Rappaport* while extending the concept of dram shop liability. The *Soronen* court held that a cause of action existed against a tavern owner for serving alcohol to an intoxicated adult.[31] Although the court used a traditional negligence analysis, it relied heavily on an alcoholic beverage control statute to establish the tavern keeper's duty.[32] The *Soronen* court also established a balancing test for evaluating proximate cause and negligence.[33] Although the court may have read *Rappaport* restrictively, the decision affected the development of New Jersey law by extending *Rappaport* beyond the serving of alcohol to minors to the serving of alcohol to adults.[34] Despite the extension by the *Soronen* court, the *Rappaport* holding remained somewhat limited because the duty that the court imposed stemmed from existing regulations that prohibited only licensees from serving alcohol to minors or intoxicated adults.[35]

A broad reading of *Rappaport* and *Soronen* makes the extension of common law dram shop liability to include the social host appear to be a logical progression. The legal issues of causation and negligence with respect to the commercial supplier of alcohol are identical to those issues with respect to the social host; however, courts have refused a concurrent extension of liability to social hosts.[36] The Appellate Division of New Jersey, for example, exemplified the reluctance of courts to expose the social host to common law dram shop liability in *Anslinger v. Martinsville Inn, Inc.*[37] In *Anslinger* a corporation held a quasi-business meeting on the premises of a licensed liquor dealer, the Martinsville Inn. Alcoholic beverages were provided for those in attendance. Anslinger, an adult who became voluntarily intoxicated at the meeting, was subsequently involved in a fatal automobile crash. Anslinger's wife sought to hold the corporation, as social host, to the same standard as a licensed commercial supplier of alcohol.[38] The court reaffirmed the holdings of *Rappaport* and *Soronen* and held that the inn was

30. 46 N.J. 582, 218 A.2d 630, 636 (1966).

31. 218 A.2d at 636.

32. *Id.* at 633, 636. For an explanation of a traditional negligence analysis, see *infra* note 62.

33. 218 A.2d at 636. Since New Jersey did not have a dram shop act that fixed the scope and extent of the tavern keeper's liability, the court concluded that the common law principles of negligence and proximate causation were applicable. *Id.* In applying these principles the court recognized that, as in *Rappaport*, "the balancing of the conflicting interests and the weighing of the policy considerations are the vital factors." *Id.*

34. Anslinger v. Martinsville Inn, Inc., 121 N.J. Super. 525, 298 A.2d 84, 87 (Super. Ct. App. Div. 1972), *cert. denied*, 62 N.J. 334 (1973).

35. 218 A.2d at 633.

36. Klein v. Raysinger, 470 A.2d 507, 510 (Pa. 1983) (most courts retain old common law rule that the consumption of alcohol, not the furnishing of it, is the proximate cause of any subsequent occurrence); *see* Holden, *supra* note 14, at 621 (citing cases); Graham, *supra* note 7, at 562-63 (citing cases). *Contra* Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15, 18 (Super. Ct. App. Div. 1976) ("It makes little sense to say that the licensee in *Rappaport* is under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely because he is unlicensed.").

37. 121 N.J. Super. 525, 298 A.2d 84 (Super. Ct. App. Div. 1972), *cert. denied*, 62 N.J. 334 (1973).

38. 298 A.2d at 88.

negligent as a licensed supplier of alcohol.[39] The court refused, however, to expand liability to encompass nonlicensees.[40]

The liability of alcohol suppliers in other jurisdictions was developing concurrently with the change in New Jersey law. A major development applying to social hosts occurred in Oregon. In 1971 Oregon's supreme court became the first court to break the nonlicensee barrier and to impose liability on a social host in *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*.[41] The court in *Wiener* held that a fraternity may be liable to third parties under general principles of negligence for serving alcohol to a minor.[42] The court imposed liability under a pure negligence theory and rejected the theory of negligence per se,[43] or statutory delineation of duty, based on a violation of the minority drinking laws.[44] Oregon's legislature was apparently uncomfortable with the potentially limitless application of the court's decision, because the legislature amended the law by limiting the possible causes of action to service of alcohol to minors or intoxicated persons.[45] Although *Wiener* was the forerunner in social host liability, the decision could be limited by its facts as applying only to the service, by social hosts, of alcohol to minors.[46]

The Appellate Division of New Jersey finally extended liability to a social host in 1976 in *Linn v. Rand*.[47] *Linn* was similar to *Rappaport* and *Wiener*, because *Linn* involved a minor who was served alcoholic beverages and subsequently became involved in a motor vehicle accident. The court refused to follow jurisdictions that had rejected social host liability, but, rather, chose to extend the rationale of *Rappaport* beyond the nonlicensee barrier to the social host.[48] Although the court extended the standard applicable to a li-

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39. *Id.*

40. *Id.* at 87, 88.

41. 258 Or. 632, 485 P.2d 18, 21-22 (1971).

42. 485 P.2d at 22; *see* Graham, *supra* note 7, at 576-77 (discussing *Wiener* holding); Note, *Chapter 801: Commercial and Social Host Liability For Dispensing Alcoholic Beverages*, 16 WILLAMETTE L. REV. 191, 200 (1980) (discussing *Wiener*).

43. Negligence per se results from the violation of a public duty, which is enjoined by law for the protection of persons or property. 57 AM. JUR. 2D *Negligence* § 9 (1971).

44. 485 P.2d at 21-22. The significance of the court's rejection of statutorily defined duty is that the court did not limit its holding only to those situations covered by statute as did the courts in *Rappaport* and *Soronen*. *See supra* notes 25, 32, and accompanying texts.

45. *See* OR. REV. STAT. § 30.955 (1981); *see also* Graham, *supra* note 7, at 572-73 (discussing negligence per se as basis for social host liability); Holden, *supra* note 14, at 627-29 (same); Note, *supra* note 42, at 195 (same).

46. 485 P.2d at 21-22. Since *Wiener* other courts have imposed liability for the service of intoxicants to minors. *See, e.g.*, Burke v. Superior Court, 129 Cal. App. 3d 570, 181 Cal. Rptr. 149 (1980); Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973).

47. 140 N.J. Super. 212, 356 A.2d 15 (Super. Ct. App. Div. 1976).

48. 356 A.2d at 17-18; *see supra* note 36 and accompanying text. The implications of extending civil liability to social hosts for the subsequent negligent acts of intoxicated adults are far-reaching. Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548, 552 (Sup. Ct. 1975) (extending liability to nonsellers would open Pandora's box), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976). Important considerations in making the extension are: (1) the expectation that a private individual possesses the same knowledge and experience as a liquor licensee in determining levels and degrees of intoxication; (2) the fairness of requiring the average individual both to detect a guest's level of intoxication and to determine the effect that another

quor licensee to a social host, the *Linn* case could be limited to the special considerations that apply to minors.[49] Consonant with that limitation, the jurisdictions that have imposed common law liability at the appellate level on social hosts have done so only in cases involving the furnishing of alcohol to minors.[50]

In 1982 a New Jersey trial court ignored these precedents and held a social host liable for furnishing alcohol to an obviously intoxicated adult in *Figuly v. Knoll*.[51] The court traced the development of social host liability, citing *Rappaport*, *Soronen*, and *Linn* and distinguishing *Anslinger*.[52] The court concluded that a social host was liable for injuries to third parties resulting from the negligent acts of an intoxicated guest, who was furnished liquor by the host.[53]

One year later, in *Kelly v. Gwinnell*, the Appellate Division of New Jersey ignored *Figuly* and held that a cause of action did not exist against a social host who furnished alcohol to his adult guest for damages resulting from the guest's intoxication.[54] The appellate division relied on recent rulings in other jurisdictions that required legislative action before a social host could be held liable for serving alcohol to intoxicated adult guests.[55] On appeal the

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drink would have on that person; and (3) the extent to which the social host must act to avoid liability. Kelly v. Gwinnell, 476 A.2d at 1233-34. Another pertinent question is whether the social host has the duty to control his guests' movements and behavior. Edgar v. Kajet, 375 N.Y.S.2d at 552; *see* Winter, *Social Host Liability for Furnishing Alcohol: A Legal Hangover?*, 10 PAC. L.J. 95, 95 (1978).

49. *See* Kelly v. Gwinnell, 463 A.2d at 389-90.

50. *Id.*; Klein v. Raysinger, 470 A.2d 507, 509 (Pa. 1983) (no cause of action against host that served adult guest); *see* Congini v. Portersville Valve Co., 470 A.2d 515, 517-18 (Pa. 1983) (companion case to *Klein v. Raysinger*) (social host negligent per se for causing minor's intoxication); *see also* Annot., 97 A.L.R.3D 528, 538 (1980) (discussing liability of suppliers of alcohol). Although a cause of action for serving an intoxicated adult may exist in Oregon, it is based on statute and not common law. *See supra* note 45 and accompanying text. Both the Iowa and Minnesota legislatures have abrogated holdings by their courts that allowed social hosts to be held liable under dram shop legislation. *See supra* notes 10-11 and accompanying text. The California legislature similarly imposed strict legislative guidelines on the California courts, expressly reversing prior decisions holding social hosts liable. CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1979); *see* Coulter v. Superior Court, 21 Cal. 3d 144, 150-52, 577 P.2d 669, 671-72, 145 Cal. Rptr. 534, 537-38 (1978) (imposing social host liability for service to adult); Bernard v. Harrah's Club, 16 Cal. 3d 313, 324-25, 345 P.2d 719, 726-27, 128 Cal. Rptr. 215, 222 (1976) (recognizing social host liability); *see also* CAL. BUS. & PROF. CODE §§ 25602, 25602.1 (West Supp. 1979) (expressly abrogating holdings in *Coulter v. Superior Court* and *Bernard v. Harrah's Club*). *See generally* Holden, *supra* note 14, at 623-31 (discussing the impact of *Coulter v. Superior Court*); Note, *Intoxicating Liquor—Persons Liable—A Social Host Who Furnishes Alcoholic Beverages to an Obviously Intoxicated Person May Be Held Accountable to Third Persons Who Are Foreseeably Injured*, 55 N.D.L. REV. 289 (1979) (discussing the holding in *Coulter v. Superior Court*).

51. 185 N.J. Super. 477, 449 A.2d 564, 565 (Super. Ct. Law Div. 1982).

52. 449 A.2d at 564-65.

53. *Id.* The court found no reasonable basis for limiting the application of *Linn* to minors. *Id.*

54. 463 A.2d at 390.

55. *Id.* The court disagreed with assertions that a nationwide judicial trend existed toward the extension of liability to social hosts. *Id.* Many courts have denied the extension of civil liability absent legislative enactment. *See, e.g.*, Cartwright v. Hyatt Corp., 460 F. Supp. 80, 82 (D.D.C. 1978); Heldt v. Brei, 118 Ill. App. 3d 798, 455 N.E.2d 842, 844 (1983); Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046, 1049 (1981); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358, 359 (1969); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71, 74

New Jersey Supreme Court had to resolve the conflict between the New Jersey decisions and decide whether to extend liability to a social host for serving alcohol to an adult.

## II. *KELLY V. GWINNELL*

The sole issue before the New Jersey Supreme Court in *Kelly v. Gwinnell* was whether a social host who supplied intoxicating beverages to a guest could be held responsible to third persons for the negligent acts of that intoxicated guest. The court used traditional common law negligence principles to resolve the issue.[56] The crucial determination in the court's negligence analysis was whether a social host has a duty to protect third persons from the risks presented by an intoxicated guest.[57] The court first determined whether a duty actually existed to prevent such a risk and then decided whether such a duty should be imposed on a policy basis.[58] The court imposed a duty on the social host in this case,[59] but emphasized that the imposition of a duty and social host liability to third persons as a result of the actions of intoxicated guests must be determined by evaluating the unique facts of each particular case.[60] The court expressly limited the imposition of a duty on the social host to situations in which the host served the guest directly and the third person's injuries resulted from the guest's drunken driving of an automobile.[61]

The majority used a traditional negligence analysis to determine whether a social supplier of intoxicating beverages could be liable to a third person for the negligent acts of an intoxicated guest.[62] A social host is negligent, the majority concluded, if he provides liquor to a guest with the knowledge that

(1966); Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897, 900 (1969) (en banc). *But see* Halligan v. Pupo, 37 Wash. App. 84, 678 P.2d 1295, 1298 (1984) (refusing to follow *Halvorson*).

56. 476 A.2d at 1221-22. In doing so the court refused to allow either the absence of decisions in this country imposing such liability or the presence of decisions indicating that such an imposition of liability is a legislative function to influence its decision. *Id.* at 1221, 1228-29.

57. *Id.* at 1222. Absent a recognized duty requiring the social host to conform to a certain standard of conduct for the protection of third persons against unreasonable risks, no cause of action can exist. *See* W. PROSSER, *supra* note 22, at 143 (listing duty as requisite element of negligence action).

58. 476 A.2d at 1222.

59. *Id.* at 1224. In a six-to-one decision the court held the guest liable with the social host as joint tortfeasors, but left open the questions of contribution and indemnity. *Id.* at 1236.

60. *Id.* at 1228. The court advocated the use of the same balancing test used in *Kelly* to make future case-by-case evaluations of duty. *Id.*

61. *Id.* at 1230.

62. *Id.* at 1221. The traditional formula necessary for a negligence cause of action requires: (1) a legal duty to conform to a standard of conduct protecting others against unreasonable risks; (2) a breach of that duty by a failure to conform to the given standard of conduct, which involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger; (3) a reasonably close causal connection between the negligent conduct and the resulting injury, or "proximate cause"; and (4) actual loss or damage resulting to the interests of another. W. PROSSER, *supra* note 22, at 143, 244, 250.

the guest must drive home.[63] Negligence is not actionable, however, unless a legally cognizable duty exists.[64] The duty question, therefore, was pivotal in the court's determination of social host liability.[65] The first question that the court addressed in its examination of duty was whether a duty currently existed under New Jersey law to protect against the risk presented when a social host furnishes alcoholic beverages to his guests. While noting that a duty had not been recognized explicitly in New Jersey, the court concluded that the imposition of a duty to prevent such risks was a logical extension of prior decisions.[66]

The court discussed the progression of the social host cases, beginning with the landmark decision of *Rappaport v. Nichols*.[67] The *Kelly* court reasoned that the significance of *Rappaport* was the imposition on a licensee of a duty to members of the general public based on principles of common law negligence.[68] The next judicial extension of this duty occurred in *Soronen v. Olde Milford Inn, Inc.*[69] The significance of *Soronen*, the court stated, was its extension of the licensee's duty to the adult customer.[70] The majority noted that the situation of the licensee and the social host are clearly distinguishable; however, the court ignored those distinctions and focused on the presence in *Soronen* of underlying considerations common to those relied on to dispute liability in *Kelly*.[71] Finally, the court considered *Linn v. Rand*[72] to be a major step in the progression of New Jersey law.[73] The *Kelly* court

63. 476 A.2d at 1221-22. The court's analysis shows a fair adherence to the traditional negligence principles. *Id.* at 1222.

64. *Id.*

65. *Id.*

66. *Id.* The court determined that social host duty and liability logically extended from *Soronen*, *Linn*, and *Rappaport*. In each of those cases the social considerations, which invest the host with immunity, were virtually identical to those present in *Kelly*. *Id.* at 1222-23. The court expressly disavowed social host immunity as not being the "inevitable result of the law of negligence." *Id.* at 1221. Although it rejected social host immunity, the court did not discuss its reasoning, but chose to focus on the question of duty. *Id.* at 1222-26. No immunity for social hosts can be found in New Jersey case law. *See Linn*, 356 A.2d at 18. Legislative attempts to halt the rising tide of traffic accidents caused by drunk drivers, however, pervade New Jersey's statutory law. *See* N.J. STAT. ANN. §§ 33:1-1 to -4 (West Supp. 1984-1985); N.J. ADMIN. CODE tit. 13 (1984).

67. 31 N.J. 188, 156 A.2d 1 (1959).

68. 476 A.2d at 1222-23. While focusing on the use of negligence principles, the court failed to discuss the limiting language of *Rappaport*: "[T]he allegations of the complaint are expressly confined to tavern keepers' sales and service which are unlawful and negligent. Liquor licensees, who operate their businesses by way of privilege rather than as of right, have long been under strict obligation not to serve minors and intoxicated persons . . . ." *Rappaport*, 156 A.2d at 10. The *Kelly* court also failed to discuss the issue of the age of the consumer of alcoholic beverages.

69. 46 N.J. 582, 218 A.2d 630 (1966).

70. 476 A.2d at 1223. The court in *Soronen*, however, relied upon an alcohol control administrative regulation to establish a duty rather than principles of common law negligence. *Soronen*, 218 A.2d at 633; see *supra* notes 25, 29, and accompanying texts for an explanation of the relationship between alcohol control statutes and duty.

71. 476 A.2d at 1223. The distinctions between a licensee and a social host are not insignificant. *See id.* at 1233-35 (Garibaldi, J., dissenting) (discussing important distinctions between licensee and social host); *supra* note 48 and accompanying text (distinguishing between licensee and social host).

72. 140 N.J. Super. 212, 356 A.2d 15 (Super. Ct. App. Div. 1976).

73. 476 A.2d at 1223 (citing *Linn*, 356 A.2d at 15).

emphasized that almost all of the considerations urged against liability in *Kelly* were manifest in *Linn*.[74] The *Kelly* court failed to address, however, the significant distinctions between the service of alcohol to a minor and service to an adult.[75] Nevertheless, noting the limitations explicit in *Rappaport*, the *Kelly* court approved *Linn*'s extension of liability to social hosts.[76]

Having justified social host liability in light of prior decisions, the New Jersey Supreme Court then addressed the propriety of imposing a duty on a social supplier of alcoholic beverages. The court recognized the existence of a duty as ultimately resting on a question of fairness.[77] The court introduced a balancing test to support the imposition of a duty on the social host to protect third parties from injury as a result of a guest's drunken driving.[78] The balancing requires a comparison on a case-by-case basis of public policy considerations that support the duty with societal interest in opposition to a duty.[79] The majority weighed the assurance of just compensation to the victims of drunk drivers, along with the deterrent effect of such a rule, against the relatively trivial consideration of interference with accepted standards of social behavior.[80]

The supreme court supported its balancing test and resulting imposition of social host duty by analogizing social host liability to the liability traditionally imposed for negligent entrustment of one's car to a person known to be intoxicated.[81] The court emphasized that the goals sought to be achieved by the imposition of a duty on the host supported liability as a matter of policy.[82] The goals sought to be achieved by the court were the fair compensa-

74. 476 A.2d at 1223. Some of the factors that the court considered to favor a finding against liability in *Kelly*, and that were present in *Linn*, include: (1) the causal events began in a social setting, not a tavern; (2) the provider of alcoholic beverages was a host, not a licensee; and (3) all of the traditional notions of fault and causation that might place sole responsibility on the intoxicated driver were present. *Id.*

75. *Id. But see* Klein v. Raysinger, 470 A.2d 507, 510-11 (Pa. 1983), and Congini v. Portersville Valve Co., 470 A.2d 515, 517-18 (Pa. 1983) (companion cases) (holding distinction between serving alcohol to minor and serving alcohol to adult significant).

76. 476 A.2d at 1223. By expressly approving *Linn*, the Supreme Court of New Jersey impliedly rejected the rationale evidenced in *Anslinger* that social host liability would be a departure from the policy expressed in *Rappaport*. *See Anslinger*, 298 A.2d at 88. Contrary to *Anslinger*, the *Kelly* court expressed that *Linn* was merely the fair implication of *Rappaport* and *Soronen*. 476 A.2d at 1223, 1224; *see also id.* at 1224 n.8 (noting inconsistency with *Anslinger* but not overruling it).

77. 476 A.2d at 1224. A determination of what is fair requires a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution. Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291, 293 (1962); *accord* Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521, 528 (1980) (advocating weighing process to determine duty).

78. 476 A.2d at 1224, 1228.

79. *Id.* at 1228. The majority suggested that a weighing process would be applied in the future. *Id.*

80. *Id.* at 1224. The court apparently concluded that any imposition on social standards of behavior as a result of social host duty would be nugatory at best.

81. *Id.* at 1224. The court cited old cases from other jurisdictions, specifically, California, Georgia, Kansas, Nebraska, and Washington, in support of this argument. *Id.* The court's argument parallels the negligent entrustment discussion present in *Rappaport*. *See Rappaport*, 156 A.2d at 7.

82. 476 A.2d at 1226.

tion of victims who are injured by drunken driving, the deterrence of drunken driving, and the motivation of hosts to take greater care when serving alcoholic beverages at social functions.[83]

The court next considered whether a duty could exist as an instrument of judicial creation.[84] While recognizing that practically every other jurisdiction that had addressed this question had concluded otherwise, the court held that the issue of social host duty was proper for judicial determination.[85] The court stated that imposing a duty on social hosts was simply defining the scope of duty in a negligence case, a traditional function of the judiciary.[86] The judiciary had been significantly involved in resolving similar issues in *Rappaport*, *Soronen*, *Figuly*, and *Linn*, and those decisions remained unaltered by the legislature. The court, therefore, reasoned that the legislature had implicitly accepted judicial determination of liability for furnishers of intoxicating beverages to those who later drive.[87] Since the legislature had not rejected the prior decisions, from which *Kelly* logically extended, the court concluded that the legislature implicitly approved the role of the judiciary in this situation.[88] If the legislature disagrees with the court, the legislature can reverse the court's decision.[89]

The dissent argued that judicial resolution of the social host duty question could drastically affect the average citizen and, therefore, the legislature should determine social host liability.[90] In response the majority asserted several reasons why its ruling would not have an extraordinary impact on

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83. *Id.* Although the court did not assure that the imposition of liability would significantly affect the attainment of these goals, the court suggested that the dire need to control drunk driving more than adequately justified the lack of assurance. *Id.* The social cost of drunken driving in New Jersey accentuated the need for a solution. The societal cost for New Jersey alcohol-related highway deaths for the period from 1978 to 1982 was estimated to be as high as $1.15 billion, based on information obtained from the New Jersey Division of Motor Vehicles. New Jersey reported a high of 376 drunken driving deaths in 1981. *Id.* at 1222, 1226 n.11.

84. *Id.* at 1226-28. This issue of legislative or judicial responsibility was the thrust of the dissent. *Id.* at 1230 (Garibaldi, J., dissenting). *See infra* notes 98-112 and accompanying text (discussing dissent).

85. *Id.* at 1226, 1228-29. The majority of jurisdictions that have faced this issue have considered the imposition of social host duty to third persons a matter for legislative, not judicial, resolution. *See, e.g.*, Cartwright v. Hyatt Corp., 460 F. Supp. 80, 82 (D.D.C. 1978) (holding social host duty is legislative question); Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046, 1049 (1981) (social host duty is legislative question); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65, 70 (1976) (social host duty is legislative question); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358, 359 (1969) (social host duty is legislative question); Manning v. Andy, 454 Pa. 236, 310 A.2d 75, 76 (1973) (declining to extend liability to nonlicensed suppliers of alcoholic beverages because a decision of such magnitude "is best left to the legislature"); Olsen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178, 181 (1979) (both social host duty and vendor duty are legislative questions), *rev'd sub nom.* Sorensen *ex rel.* Kerscher v. Jarvis, 119 Wis. 2d 627, 359 N.W.2d 108, 119 (1984). *But see* Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (judicial creation of social host liability) (abrogated by statute).

86. 476 A.2d at 1226.

87. *Id.* at 1227-28.

88. *Id.* at 1227. The cases cited by the court illustrate that the legislature had abrogated judicial decisions before when the courts had gone too far. *Id.* at 1227-28.

89. *Id.* at 1227.

90. *Id.* at 1231 (Garibaldi, J., dissenting).

the average citizen: (1) homeowner's insurance was available to the social host and would cover the liability created in *Kelly*; (2) society had realized that it must change its habits, and as a result, hosts had already begun to monitor their guests' drinking to some extent; (3) the result in *Kelly* was required to increase the likelihood of compensation for the innocent victims of drunken driving; and (4) extending liability to social hosts would provide added deterrence against drunken driving.[91] Applying the balancing test, the court said that any impact on the average citizen could not be extraordinary relative to the tremendous social costs of drunken driving.[92] For example, the extraordinary financial losses suffered by society as a result of drunken driving would far outweigh the financial impact of an insurance premium increase on the homeowner or tenant.[93] The suffering and death that the drunken driver causes outweigh the burden placed on the social host to oversee the serving of liquor, the burden on the guests to make certain that if one is drinking another is driving, and the burden on all to take reasonable steps even though the guest may become belligerent.[94]

Consistent with the contention that an evaluation of the unique facts and circumstances of each case must determine the existence of the social host's duty to third persons, the New Jersey court strictly limited its holding in *Kelly* to the facts before the court.[95] A social host's duty to third persons only arises in situations in which the host directly served a guest and the injuries to the third person resulted from the guest's drunken driving of an automobile.[96] Although the court limited its holding ostensibly to filter out baseless claims, the majority's advocacy of the balancing test and its inclination to impose social host liability caused the dissent to suggest that the scales may often tip in favor of social host liability, even though the facts of a case fall outside the limitations imposed in *Kelly*.[97]

While supportive of stricter measures to deter drunken driving, the dissent concluded that the legislature could more effectively achieve the majority's goals of compensating victims and deterring drunken driving without saddling the average citizen with such an onerous burden.[98] The legislature's special knowledge and ability to investigate the issue thoroughly made the legislature more qualified to decide whether to impose liability.[99] The dissent concurred in the majority's approval of *Linn*, but only to the extent that

91. *Id.* at 1227.
92. *Id.* at 1229.
93. *Id.*
94. *Id.*
95. *Id.* at 1230.
96. *Id.* The court limited the imposition of duty to automobile accidents because they are routinely thoroughly investigated and, thereby, furnish clear objective evidence establishing intoxication and the cause of the accident. *Id.*
97. *Id.* at 1232-34 (Garibaldi, J., dissenting); *accord* Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548, 552 (Sup. Ct. 1975) (suggesting imposition of social host liability would have limitless ramifications), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976).
98. 476 A.2d at 1230-33 (Garibaldi, J., dissenting). This burden includes the possibility that homeowners' insurance policies would not cover liability against social hosts, resulting in catastrophic loss to individual social hosts. *Id.* at 1234-35.
99. *Id.* at 1235-36.

*Linn* applied to social hosts who serve liquor to minors.[100] While many other jurisdictions had considered the social host duty issue prior to *Kelly*, no jurisdiction had established a duty against a social host for serving alcoholic beverages to an adult.[101] A majority of courts, the dissent noted, concur with the view that the issue is properly left to the legislature.[102]

The dissent downplayed the majority's concern for the compensation of victims of drunken driving, opining that victims were adequately compensated absent social host liability.[103] A New Jersey law requires motorists to have uninsured motorist coverage.[104] In addition, if a drunk driver strikes and injures an uninsured pedestrian and the pedestrian cannot obtain satisfaction from a judgment against the drunken driver, the pedestrian can satisfy the judgment out of the Unsatisfied Claim and Judgment Fund.[105]

The dissent noted the dissimilarity between licensees and social hosts and concluded that the majority created problems by refusing to distinguish between the two with respect to liability for furnishing alcoholic beverages.[106] Licensed, commercial suppliers are experienced in the business of selling liquor and deal with the public every day; however, a social host is not experienced and may have more difficulty in determining levels and degrees of intoxication.[107] A social host also does not have the control over the liquor that a commercial bartender has.[108] The social host often drinks with his guests; the more the host drinks the less able he will be to determine when a guest is intoxicated.[109] As a practical matter, by virtue of the detached nature of the relationship, a commercial distributor is in a better position to refuse to serve a customer or request that he leave. A social host, however, is faced with potentially intense social and personal ramifications when he must tell his boss, client, friend, neighbor, or family member that he believes that person is intoxicated and cannot handle another drink.[110]

The dissent also expressed concern with the implicit assumption that if a social host has a duty to third persons, then he must have a concurrent abil-

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100. *Id.* at 1230 n.1. The dissent noted that the distinction between serving alcohol to a minor and to an adult was clearly expressed in legislative policy. *Id.*; *see* N.J. STAT. ANN. § 33:1-77 (West Supp. 1984-1985). That legislative policy, coupled with the fact that minors occupy a special place in society and traditionally have been protected by state regulation from the consequences of their own immaturity, suggests a basis for *Linn* absent legislative determination. *Accord* Klein v. Raysinger, 470 A.2d 507, 509-10 (Pa. 1983) (disallowing social host liability for service to adult); Congini v. Portersville Valve Co., 470 A.2d 515, 517-18 (Pa. 1983) (allowing social host liability for service to minor).

101. 476 A.2d at 1221 n.2.

102. *Id.* at 1231 (Garibaldi, J., dissenting); *see supra* note 85 and accompanying text (compilation of jurisdictions so holding).

103. 476 A.2d at 1232-33.

104. N.J. STAT. ANN. § 39:6A-14 (West 1973).

105. *Id.* §§ 39:6-64 to -73 (West 1973 & Supp. 1984-1985) (providing, subject to certain limitations, that unsatisfied judgments can be paid from the fund).

106. 476 A.2d at 1233 (Garibaldi, J., dissenting).

107. *Id.*

108. *Id.* at 1234. In a commercial setting a bartender or waitress serves the guest a drink, but in a social setting guests frequently serve themselves or are served by other guests. *Id.*

109. *Id.*

110. *Id.*

ity to control the movements and behavior of the intoxicated guests.[111] This assumption raises important questions of other tortious conduct, such as false imprisonment or assault and battery, in which a social host may attempt physically to restrain an intoxicated guest from leaving. Finally, the dissent disagreed with the majority's conclusion that the legislature could reverse the majority's decision if it disagreed with the imposition of social host liability.[112]

## III. CONCLUSION

After the court's decision in *Kelly* New Jersey became the only jurisdiction in the United States to recognize a cause of action against a social host for the negligence of an intoxicated adult guest. While the majority claimed that *Kelly* was a logical extension of prior decisions and purported to limit its holding to the facts of the case, *Kelly* was actually a sizeable step in logic in New Jersey case law. Prior to *Kelly* the New Jersey Supreme Court had never explicitly recognized a cause of action against a social host, and lower courts had not concurred on the existence of that cause of action. When *Kelly* adopted the holding in *Linn*, with its crossing over the nonlicensee barrier for serving alcohol to minors, and expanded that holding to include service to adult guests, New Jersey advanced to the forefront in the area of liability against suppliers of alcohol for the first time since *Rappaport*.

*Kelly* can be interpreted broadly or narrowly. Read narrowly *Kelly* restricts the imposition of social host duty to its express limitations. No cause of action, therefore, could exist outside the bounds of these limitations, and the impact of *Kelly* would be minimal. Read broadly *Kelly* would have a significant impact and almost limitless application. Social host liability would be imposed in any situation in which the balancing test indicated a weighting in favor of a duty.

The future effect of *Kelly* largely depends on the legislative response to it. If the New Jersey legislature abrogates or modifies the outcome of *Kelly*, a clear message would emanate to courts that the imposition of duty on social hosts is a matter for legislative determination. If the legislature does not respond, however, the message to courts will be equally clear, signaling tacit approval of judicial determination of the social host duty question. The decision in *Kelly*, therefore, ultimately places the question of social host duty upon the shoulders of the body that the *Kelly* dissent asserted is most adequately equipped to resolve it, the legislature.

*C. Kent Adams*

111. *Id.* The majority opinion does not indicate how far a social host must go to avoid liability.

112. *Id.* at 1235.